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No. 91-260

In The

Supreme Court of the United States

October Term, 1991

JANET METZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONER

ROBERT C. FOULSTON
GERALD SAWATZKY*
FOULSTON & SIEFKIN
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

Attorneys for Petitioner

Date: October 25, 1991
*Counsel of Record

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The brief for the United States in opposition is as vulnerable for what it does not say as for what it does say.

The United States does not disagree with Professor Moore's observation that *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), provides "little guidance" as to when state law certification procedures should be used or the factors to be considered. 1A Moore's Federal Practice, Sec. 0.203[5], p. 2159 (Second Edition, 1991). Nor does the United States take exception to the widespread conflict, confusion and lack of uniform standards afflicting federal courts in deciding whether to certify state law issues to

appropriate state appellate courts, under the procedures now available from nearly all the states. (Petition at 9-13).

Moreover, the United States does not deny that the court of appeals decided the determinative issue of state property law by relying upon *State v. Mollier*, 96 Kan. 514, 152 P. 771 (1915), which neither the parties nor the district court had cited or discussed, in either district court or appellate proceedings. Nor does the United States deny that on appeal, instead of relying on *Mollier*, it changed its position to invoke tax code sections 2036 and 2037 which it had specifically disclaimed as inapplicable, at the district court level.

The United States also cannot deny that a certification to the Kansas Supreme Court would be expeditious and provide a definitive answer to an important state property law issue which will often recur in future cases, including federal tax cases which can only be decided by federal courts. This is not a diversity case which plaintiff could have filed in state court. Nor does the United States deny that if Kansas recognizes an equitable property interest in petitioner at the time of Mr. Metz' death, the government's estate tax lien does not attach to that interest. (Petition at 14).

What the United States *does* say seeks to justify the court of appeals' refusal to certify the governing state property law issue, on grounds that (1) "[t]he decision of the court of appeals is correct", and (2) that petitioner's motion to certify was "untimely". (Br. in Opp. at 4, 6). On these points the government's analysis is seriously flawed.

As in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), petitioner here did not file a motion for certification until a petition for rehearing was filed. This Court rejected respondents' attempt in *Lehman* to preclude consideration of the certification process on this ground – with the result that the court of appeals on remand did make a certification, which resulted in a state court ruling disagreeing with the original federal appellate decision.

In the present case, petitioner relied on recent Kansas decisions accepting the general rule of equitable conversion and had no reason to foresee the appellate court's *sua sponte* application of the 1915 *Mollier* decision which was neither in point nor was any longer the law. The need for certification to the Kansas Supreme Court, in short, became evident only when the court of appeals went outside the bounds of the case presented to it by the litigants. It is especially in such a case that a federal court should explicitly consider certification to the state court. Tenth Circuit Rule 27.1 permits certification "upon motion or upon the court's order." (Petition at A37). When the court *sua sponte* creates the need for certification, the court should be obliged to consider certification *sua sponte*, as well as on a party's motion filed in response to the court's own archaeological exploration of dated and repealed state laws.

The United States also misconstrues *Mollier* and misstate's petitioner's position regarding it. *Mollier* is not merely an obsolete decision construing a repealed statute. Before the old Kansas inheritance tax statute was repealed in 1978, the Supreme Court of Kansas held that its cases showed a "clear trend to follow the general rule of law and apply equitable conversion" (In re *Estate of*

Hills, 222 Kan. 231, 238, 564 P.2d 462, 468 (1977); followed in an estate tax case, *Frisbie v. Director of Taxation*, 1 Kan. App.2d 416, 566 P.2d 29 (1977)). Accordingly, *Mollier's* rejection in 1915 of the doctrine of equitable conversion as a basis for avoiding the inheritance tax was no longer law in Kansas under the old statute. But even more critical is the other difference – ignored by the United States – that *Mollier* merely rejected equitable conversion as a reason for avoiding the Kansas inheritance tax imposed on a transfer of legal title by will. It did not pretend to hold that the woman who had earned the home, legal title to which was transferred to her by will, did not have an equitable property interest vested when the testator died. *Mollier* recognized she had a vested property interest, but that the title transfer was nonetheless taxable:

> " . . . Conceding that years before the statute was enacted *the defendant acquired a vested interest*, subject to being defeated by her nonperformance, this right was acquired subject to the power of the state to regulate the transmission of property in the manner provided in the contract . . . The fact is that the particular method chosen [transfer of title by will] . . . called for a transaction which the legislature has declared shall be taxed . . .
>
> "It has been universally held by the courts that statutes of this character impose a tax *not upon the property but upon the succession, the right to take the property by will* . . . " (96 Kan. at 519, 152 P. at 773) (Our emphasis).

The foregoing demonstrates that the old Kansas statute taxed transfer of *legal title* to property pursuant to a

will – that *Mollier* did not purport to hold that one who earned real property by a services contract did not have a vested equitable property interest in it. Kansas did not then and does not now hold that one who earns property by the sweat of one's brow is in an inferior position to one who merely pays cold cash. Yet this is the real effect of the court of appeals' decision and the government's position in this Court.[1]

The United States disingenuously bootstraps its inequitable position by quoting out of context from a portion

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[1] Needless to say, the state inheritance tax in *Mollier* was a very small percentage. Here, petitioner's federal government would take the entire home from her, vested equitable interest and all.

The government also misapprehends the California and Washington cases overruling their *Mollier*-era estate tax cases. (Br. in Opp. at 7, note 4). The recent cases overrule the state taxability of legal title transfers by will, and permit taxation only of the equitable ownership, under the old inheritance tax statutes like that construed by *Mollier* in Kansas. (Petition at 17, note 5). *Frisbie v. Director of Taxation*, 1 Kan.App.2d 416, 566 P.2d 29 (1977), is consistent with the new line of cases. *Frisbie* thus applied the general rule of equitable conversion as required by the Kansas Supreme Court. *In re Estate of Hills*, 222 Kan. 231, 564 P.2d 462 (1977).

The government's suggestion that petitioner had a unilateral contract creating a reversionary interest in Mr. Metz until his death (Br. in Opp. at 5) is contrary to fact. Petitioner signed a bilateral written contract committing her to perform for the rest of Mr. Metz' life. (Exs. B and D to Petitioner's Motion for Summary Judgment). Thus, Mr. Metz held no reversionary interest under either Kansas law or federal estate tax law. (See 26 U.S.C. § 2037, Petition at A41, which statute the government considered to be inapplicable in the district court. (Petition at 7, note 2).

of the *Mollier* opinion, (Br. in Opp. at 5), without pointing out that the quotation purports to describe, not the *Mollier* case, but the holding of an earlier Kansas case, *Schoonover v. Schoonover*, 86 Kan. 487, 121 P. 485 (1912). The state contended in *Mollier* that *Schoonover* held that real property devised pursuant to contract remained property of the deceased and was liable for his debts – a nonexistent holding as a casual reading of *Schoonover* demonstrates. Since Petitioner described this aberration (Petition at 15, footnote 4), the government's present quotation from a demonstrably wrong description of *Schoonover's* holding, without even mentioning *Schoonover* anywhere in its brief, appears to be deliberate. The court of appeals also quoted the purported holding of *Schoonover*, including the named reference to that opinion, but without realizing that *Schoonover* held no such thing.[2]

The present Kansas estate tax statute, K.S.A. 79-1547, is patterned after the federal estate tax statute, in taxing the value of all property "to the extent of the interest therein of the decedent at the time of his or her death." (Petition at A43). An equitable property interest is not includable in such an estate for tax purposes although the estate may hold legal title. (Petition at 14). The general

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[2] Petition at A9. The government also misstates the district court's holding by saying the district court held that petitioner's contract was not enforceable until after Mr. Metz' death. (Br. in Opp. at 3). The district court, conceding its enforceability, held that the right to specific performance was irrelevant because Mr. Metz complied with the contract by executing a codicil. (Petition at A25). But it is the *right* to specific performance which gives rise to equitable conversion – not the necessity to exercise that right in court. (Petition at 5-7).

rule of equitable conversion is that one performing a services contract becomes equitable owner of the property as surely as does one paying money under an installment contract. Kansas follows the general rule. (Petition at 6-7).

Petitioner agreed to uproot her family to perform a difficult services contract for the rest of Mr. Metz' life – a period which turned out to be four years – a contract she accepted only when assured by Mr. Metz' Kansas lawyer that it was specifically enforceable. Kansas indeed does specifically enforce such contracts; and accepts the general rule of law applying equitable conversion. That general rule does not invidiously discriminate between those performing services, and those paying money, for land. The lower court's legalistic rationalization misconstruing a 1915 Kansas case dealing with a repealed statute in order to legitimize that discrimination amounts to judicial arrogance antithetical to that "cooperative judicial federalism" needed to cement our federal union of states. Stripped of legalistic pretense, the government's position reminds one of the emperor and his clothes, of whom the young child exclaimed, "But he's naked".

CONCLUSION

Lehman Brothers v. Schein, 416 U.S. 386 (1974), pointed the way for federal court certification of state law issues. Today nearly all states permit certification. The considerations which led this Court to review the court of appeals' failure to consider certification in *Lehman* are now far more compelling. Only this Court's guidance in

the form of uniform factors to be considered, in order to test the propriety of certification, will solve the conflict and lack of uniformity in this new and growing area of federal procedural law.

The petition should be granted.

ROBERT C. FOULSTON
GERALD SAWATZKY*
FOULSTON & SIEFKIN
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371
Attorneys for Petitioner

*Counsel of Record